SINGAPORE REPORTS

Seow Teck Ming & Anor v Tan Ah Yeo & Anor and another appeal

COURT OF APPEAL (SINGAPORE) — CIVIL APPEAL NOS 76 OF 1989 AND 18 OF 1989
YONG PUNG HOW CJ, THEAN AND CHAN SEK KEONG JJ
6 JUNE 1991

Damages (Personal Injury or Death) — Collision between motor sampans on Singapore River — Claim for damages on behalf of dependants and estate of deceased — Defence of limitation — Application of s 8 of Maritime Conventions Act 1911 — Extension of limitation period — Prejudice to plaintiffs if limitation period not extended — Maritime Conventions Act 1911, s 8

Shipping and Navigation — Collision between motor sampan and bumboat — Whether 'vessels' under Maritime Conventions Act 1911 — Conformity of Maritime Conventions Act 1911 with Brussels Convention 1910 — Whether Singapore River place for navigation — Maritime Conventions Act 1911, s 8

Civil Procedure — Pleadings — Defence, amendment of — Application to amend defence to include defence of limitation — Injustice to plaintiffs — Prejudice to plaintiffs caused by amendment — Maritime Conventions Act 1911, s 8

Civil Procedure — Limitation — Extension of limitation period — Defence of limitation under s 8 of Maritime Conventions Act 1911 — Test to be applied — Circumstances of the case — Prejudice as a post-writ factor — Relevance of post-writ factor — Maritime Conventions Act 1911, s 8

Civil Procedure — Interlocutory order — Appeal from decision of judge-in-chambers — Judge hearing further arguments — Procedure for appeal — Rules of the Supreme Court 1970, O 57 rr 4 & 17 — Supreme Court of Judicature Act (Cap 322, 1985 Ed), s 34(2)

Tort — Negligence — Damage — When arising — Negligence of solicitors in commencing action which is already time-barred — When damage is caused

The plaintiffs are the personal representatives of Tay Kian Ho, deceased. They are claiming damages against the defendants on behalf of the dependants and the estate of the deceased arising from the death of the deceased in a collision between a motor sampan belonging to the second defendant and a bumboat belonging to one of the plaintiffs. The collision took place at a stretch of the Singapore River near the Attorney General's Chambers.

The writ was issued on 30 April 1981, almost three years after the collision. A date of hearing was fixed for 4 August 1988. However, on 26 July 1988, the defendants' solicitors took out further directions to amend the defence to add the defence of limitation based on s 8 of the Maritime Conventions Act 1911 ('the MCA 1911'). If applicable, this would have barred the action upon the expiration of two years from the date of the collision. Leave was given by the assistant registrar to amend the defence. The appeal against this decision was initially dimissed, but after hearing further arguments, the learned judge allowed the appeal. Civil Appeal No 76 of 1989 ('the first appeal') is the defendants' appeal against this order.

The plaintiffs had, immediately after the defendants were given leave to amend their defence to plead limitation, taken out a notice of motion for an order to try the issue whether s 8 of the MCA 1911 applied to this action, and if it did, for an order that the limitation period be extended and the plaintiffs be allowed to proceed with the action. The learned judge held that s 8 of the MCA 1911 applied to the action but refused leave to extend time. The second appeal, Civil Appeal No 18 of 1989, is the plaintiffs' appeal against this decision.

Held, dismissing the first appeal and making no order in the second appeal:

(1) The negligence, if any, of the plaintiffs' solicitors in this case lies not in giving advice or drafting a document [as in previous cases concerning solicitors' negligence] but in commencing a worthless action. It was entirely foreseeable that the defendants would plead limitation. The action was worthless when commenced as it was time-barred, and would only acquire some value should the defendants fail to plead limitation at all. The plaintiffs had suffered damage when their solicitors commenced a defeasible action.

(2) The plaintiffs will, therefore, be prejudiced if the defendants are granted leave to amend their defence at this stage of the proceedings as whatever claim they may have against their solicitors for negligence has been time-barred. The loss of the opportunity to pursue a viable claim is sufficient prejudice to debar the defendants from obtaining leave to amend their defence.

Obiter:

(3) The decision of the learned judge in not extending the limitation period is wrong. Although the prejudice to the plaintiffs is a post-writ factor, it has to be taken into account in an application for extension of the limitation period under the MCA 1911. The learned judge adopted a too-narrow view of the ambit of s 8 in limiting the relevant factors only to those occurring before the issue of the writ. The relevant factors must be those obtaining at the time the application is made or heard.

(4) Whether or not an extension of time ought to be granted under s 8 of the MCA 1911 depends on the circumstances of each case; they need not be exceptional or special.

(5) The MCA 1911 applies to all actions whether brought as admiralty or common law actions as the MCA 1911 makes no distinction between them. The important provision is that the court that hears the case has jurisdiction to deal with it, and this action was brought on the basis that the High Court has jurisdiction. Moreover, there is no such distinction in the Brussels Convention 1910 as the distinction is peculiar to the English judicial system.

(6) All vessels propelled by anything other than by oars are vessels for the purpose of the MCA 1911, whether they are sea-going vessels or vessels of inland navigation. The motor boats belonging to the parties in this case are therefore vessels under the MCA 1911, notwithstanding that they were only licensed to ply within the port limits of Singapore. This construction does not render the MCA 1911 in conflict with the Brussels Convention 1910; the scope of the MCA 1911 is wider than that of the Convention, which was not intended to apply to collisions between vessels of inland navigation.

(7) The Singapore River was and is a place for navigation and the two motor boats were being used for navigation on the Singapore River at the time of the collision.

(8) Section 8 of the MCA 1911 [for the reasons in (5) and (6) above] applies in this action and the plaintiffs' cause of action was barred upon the expiration of two years from the date of the collision.

(9) Where a party acquires the right of appeal, under s 34(2) of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) ('Cap 322'), time begins to run under O 57 r 4 for filing the notice of appeal, ie either when he is informed of the judge's certification that he does not wish to hear further argument, or, where there is rehearing, from the date of the order made on the rehearing. If the party fails to file his notice of appeal in compliance with O 57 r 4, he may apply to the Court of Appeal, but not to the court below, for extension of time under O 57 r 17.

(10) The aggrieved party need not request further argument. He can apply for leave from the judge or the Court of Appeal and by virtue of s 5 of Cap 322, he must first apply to the judge who heard the interlocutory application. A further application may be made to the Court of Appeal under O 57 r 16(3); what is not provided is the period within which he must apply for leave.

Cases referred to

1 *Butterworth & Co (Publishers) Ltd & Ors* v *Ng Sui Nam* [1985] 1 MLJ 196; [1987] 2 MLJ 5 (CA) (refd)
2 *The 'Vadne'* [1959] 2 Lloyd's Rep 480 (refd)
3 *Edwards* v *Quickenden & Forester* [1939] P 261 (follld)
4 *Ellerman Lines Ltd* v *Murray* [1931] AC 126 (refd)
5 *Stag Line Ltd* v *Foscolo, Mango & Co Ltd & Ors* [1932] AC 328 (refd)
6 *Salomon* v *Commissioners of Customs & Excise* [1967] 2 QB 116 (refd)
7 *Post Office* v *Estuary Radio Ltd* [1967] 1 WLR 1396; [1967] 3 All ER 663 (refd)
8 *The 'Annie Hay'* [1968] P 341 (refd)
9 *Corocraft Ltd & Anor* v *Pan American Airways Inc* [1969] 1 All ER 82 (refd)
10 *James Buchanan & Co Ltd* v *Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 (refd)
11 *Fothergill* v *Monarch Airlines Ltd* [1980] 2 All ER 696 (refd)
12 *The 'Sandrina'* [1985] 1 Lloyd's Rep 181; [1985] 1 All ER 129 (refd)
13 *Weeks* v *Ross* [1913] 2 KB 229 (follld)
14 *The 'Arraiz'* [1924] Ll L Rep 382; (1924) 132 LT 715 (refd)
15 *The 'Llandovery Castle'* [1920] P 119 (refd)
16 *The 'Kashmir'* [1923] P 85 (refd)
17 *The 'Alnwick'* [1965] 1 All ER 423 (refd)
18 *The 'Owenbawn'* [1973] 1 Lloyd's Rep 56 (refd)
19 *The 'Albany'* [1983] 2 Lloyd's Rep 195 (refd)
20 *The 'Zirje'* [1989] 1 Lloyd's Rep 493 (follld)
21 *The 'Seaspeed America'* [1990] 1 Lloyd's Rep 150 (follld)
22 *Ch'ng Kim Huat* v *Hamburg-Amerika-Nische Packetfahrt-Aktien Gesselschaft* [1936] MLJ 171 (refd)
23 *The 'Atlantic Faith'* [1978] 2 MLJ 187 (refd)
24 *Fletcher & Son* v *Jubb, Booth & Helliwell* [1920] 1 KB 275 (refd)
25 *Purves* v *Landell* (1845) 12 Cl & Fin 91; 8 ER 1332 (refd)
26 *Godefroy* v *Dalton* (1830) 6 Bing 460; 130 ER 1357 (refd)
27 *Wilson* v *Brett* (1843) 11 M & W 115; 152 ER 737 (refd)
28 *Esso Petroleum Co Ltd* v *Mardon* [1976] 1 QB 801 (refd)
29 *Midland Bank Trust Co Ltd & Anor* v *Hett, Stubbs & Kemp* [1978] 3 All ER 571 (refd)
30 *Ross* v *Caunters* [1980] 1 Ch 297 (refd)
31 *Ketteman & Ors* v *Hansel Properties Ltd & Ors* [1987] 1 AC 189 (follld)
32 *Steward* v *North Metropolitan Tramways Co* (1886) 16 QBD 556 (refd)
33 *UBAF Ltd* v *European American Banking Corp* [1984] 1 QB 713 (refd)
34 *Pirelli General Cable Works Ltd* v *Oscar Faber & Partners* [1983] 2 AC 1 (refd)
35 *Cartledge & Ors* v *E Jopling & Sons Ltd* [1963] AC 758 (refd)
36 *Sparham-Souter & Anor* v *Town & Country Developments (Essex) Ltd & Anor* [1976] 1 QB 858 (refd)
37 *Forster* v *Outred & Co* [1982] 1 WLR 86; [1982] 2 All ER 753 (refd)
38 *DW Moore & Co Ltd & Ors* v *Ferrier & Ors* [1988] 1 WLR 267; [1988] 1 All ER 400 (refd)
39 *JK Buckenham Ltd* v *Iron Trade Mutual Insurance Co Ltd* [1990] 1 All ER 808 (follld)
40 *Islander Truckling Ltd* v *Hogg Robinson & Gardner Mountain (Marine) Ltd* [1990] 1 All ER 826 (follld)
41 *Bank of America NT & SA* v *Chai Yen* [1980] 1 MLJ 198 (refd)

Legislation referred to

Contributory Negligence and Personal Injuries Act (Cap 54, 1985 Ed) s 4
Maritime Conventions Act 1911 ss 2, 8, 9, 10
Merchant Shipping Act 1894 s 742
Merchant Shipping Act (Cap 179, 1985 Ed) s 2(1)
Supreme Court of Judicature Act (Cap 322, 1985 Ed) s 34(2)
Rules of the Supreme Court 1970 O 18 rr 8, 11, O 57 rr 4, 17

Loh Boon Huat (*Steven Ang* with him) for the appellants in Civil Appeal No 76 of 1989 and for the respondents in Civil Appeal No 18 of 1989.

Karuppan Chettiar for the respondents in Civil Appeal No 76 of 1989 and for the appellants in Civil Appeal No 18 of 1989.

Cur Adv Vult

Chan Sek Keong J (delivering the judgment of the court): These are appeals against two decisions made under different interlocutory applications in the same action, viz Suit No 1399 of 1981. As they raised related issues of law on the same facts, we heard them one immediately after the other. We now give our judgment on both appeals.

In Suit No 1399 of 81, the plaintiffs are the personal representatives of Tay Kian Ho, deceased, ('TKH'). The defendants are Seow Teck Ming and Lim Pin. The plaintiffs are claiming damages on behalf (a) of the dependants and (b) of the estate of TKH against the defendants arising from the death of TKH in a collision between a motor sampan of 79.11 tons, belonging to the second defendant and a motor sampan (bumboat) of 12.34 tons belonging to one of the plaintiffs. The collision took place at about 7.30am on 20 May 1978 at a stretch of the Singapore River in the vicinity of the Attorney General's Chambers.

The writ was issued on 30 April 1981, just short of three after the collision. The statement of claim was filed on 12 February 1982. By their defence filed on 11 March 1982, the defendants denied negligence and

claimed that the collision was caused solely or contributed to by TKH who was then in control of the bumboat. Directions for the trial of the action were given on 21 August 1984. Notice of trial was given on 18 September 1984 and on 11 December 1987, a date of hearing was fixed for 4 August 1988. On 20 July 1988, the solicitors for the defendants applied to discharge themselves on the ground of inability to trace the defendants. The hearing of this application was fixed for 29 July 1988.

Defence of limitation

Instead of proceeding with the application to discharge themselves, the defendants' solicitors took out further directions on 26 July 1988 to amend the defence to add the defence of limitation based on s 8 of the Maritime Conventions Act 1911 ('the MCA 1911') which, if applicable, would have barred the action upon the expiration of two years from the date of the collision. On 1 August 1988, the assistant registrar gave leave to the defendants to amend the defence. The amended defence was filed on 2 August 1988 and the reply was filed on 3 August 1988.

On 4 August 1988, the plaintiffs gave notice of appeal against the order of the assistant registrar. The appeal was heard on 15 March 1989 by Rajah J who dismissed the appeal. On 21 March 1989, the solicitors for the plaintiffs requested for further arguments. Rajah J, after hearing further arguments, changed his mind and allowed the appeal. Civil Appeal No 76 of 1989 is the defendants' appeal against the order. The manner in which the defendants' solicitors proceeded to file this appeal is a matter on which we will make some observations at the end of this judgment.

Immediately after the defendants were given leave to amend their defence to plead limitation, the plaintiffs' solicitors took out a notice of motion for an order to try the issue whether s 8 of the MCA 1911 applied to this action, and if it did, for an order that the limitation period be extended and the plaintiffs allowed to proceed with the action. This application was heard before Chao Hick Tin JC on 4 August 1988 and 11 October 1988. Judgment was given on 14 February 1989, before Rajah J heard the appeal against the assistant registrar's decision. His Honour held that s 8 of the MCA 1911 applied to the action. He also refused leave to extend time. Civil Appeal No 18 of 1989 is the plaintiffs' appeal against this decision.

Civil Appeal No 18 of 1989 — Application of the MCA 1911

The MCA 1911 is an imperial legislation enacted by the United Kingdom Parliament. It came into force on 16 December 1911 and pursuant to s 9 thereof, its application was on 1 February 1913 extended to the Straits Settlements as part of His Majesty's dominions. In his grounds of judgment, Chao Hick Tin JC held that the MCA 1911 was still part of the law of Singapore as it had not been repealed by any local legislation. Counsel for the plaintiffs has not argued against this finding. In our view, the finding was undoubtedly correct. Section 4 of the Contributory Negligence and Personal Injuries Act (Cap 54, 1985 Ed), which came into force on 1 March 1954, was enacted on the basis that the MCA 1911 was part of the law of Singapore then. When Singapore became independent, first as a constituent state of Malaysia on 16 September 1963 and then on 9 August 1965 as a sovereign republic, the MCA 1911 continued as part of the laws of Singapore under the relevant constitution: see *Butterworth & Co (Publishers) Ltd & Ors* v *Ng Sui Nam*,[1] affirmed by the Court of Appeal.

Scope of the MCA 1911

Counsel for the plaintiffs has raised two arguments on the scope of the MCA 1911. The first is that the MCA 1911 does not apply to common law negligence actions but only to admiralty actions in rem or in personam. He relies on the historical source of the MCA 1911 and also s 5 in support of this argument. Section 5 provides as follows:

> Any enactment which confers on any court Admiralty jurisdiction in respect of damage shall have effect as though references to such damage included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought in rem or in personam.

On this basis, counsel maintains that as the present action was brought as a common law action, it was not subject to the limitation period of two years as provided in s 8 of the MCA 1911 but to the ordinary limitation period of six years under the Limitation Act (Cap 10, 1970 Ed) (as it stood in 1981).

We are unable to accept this submission. We are of the view that the MCA 1911 applies to all actions whether brought as admiralty or common law actions for the reasons following. Firstly, the MCA 1911 makes no distinction between admiralty actions and common law actions. Section 9(3) thereof provides that it applies to all cases heard and determined *in any court having jurisdiction to deal with the case* and in whatever waters the damage or loss in question was caused. This action was brought on the basis that the High Court has jurisdiction. Secondly, if it were necessary to refer to the terms of the Brussels Convention 1910 ('the Convention'), which was an international agreement, pursuant to which the MCA 1911 was enacted, one would not find nor expect to find in them any distinction between the two forms of curial proceedings simply because they are peculiar to the English judicial system. Moreover, as art 1 of the Convention expressly refers to collisions

between vessels 'in whatever waters the collision takes place', any municipal legislation giving effect to the Convention would be made applicable to such collisions. In the present case, it has not been argued that the tidal part of the Singapore River (where the collision occurred) is not part of the 'waters' of Singapore. Thirdly, in *The 'Vadne'*,[2] Lord Merriman P said that he had not the slightest doubt that the MCA 1911 would have been applicable even if the writ in that case had been issued in the Queen Bench's Division.

The second point raised by counsel for the plaintiffs is that the MCA 1911 should be construed to apply only to collisions between sea-going vessels or between sea-going vessels and vessels of inland navigation, as that was the ambit of the Convention pursuant to which the MCA 1911 was enacted.

The Brussels Convention 1910 — Collisions between vessels

Counsel has referred to the following articles of the Convention:

> Article 1. Where a collision occurs between *sea-going vessels or between sea-going vessels and vessels of inland navigation*, the compensations due for damages caused to the vessels, or to any things or persons on board thereof, shall be settled in accordance with the following provisions, *in whatever waters the collision takes place*. (Emphasis added.)
>
> Article 4. If two or more vessels are in fault the liability of each vessel is in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability is apportioned equally.
> ...
> In respect of damages caused by death or personal injuries, the vessels in fault are jointly as well as severally liable to third parties, without prejudice however to the right of the vessel which has paid a larger part than that which, in accordance with the provisions of the first paragraph of this Article, she ought ultimately to bear, to obtain a contribution from the other vessel or vessels in fault.
>
> It is left to the law of each country to determine, as regards such right to obtain contribution, the meaning and effect of any contract or provision of law which limits the liability of the owners of a vessel towards persons on board.
>
> Article 12. The provisions of this Convention shall be applied as regards all persons interested when all the vessels concerned in any action belong to States of the High Contracting Parties, and in any other cases for which the national laws provide.
>
> Provided always that —
>
> 1 As regards persons interested who belong to a non-contracting State, the application of the above provisions may be made by each of the contracting States conditional upon reciprocity.
>
> 2 Where all the persons interested belong to the same State as the court trying the case, the provisions of the national law and not of the Convention are applicable.

We agree with counsel that the Convention was intended to apply only to collisions between (1) sea-going vessels and (2) between sea-going vessels and vessels of inland navigation. It was not intended to apply to collisions between vessels of inland navigation, which were matters within the exclusive jurisdiction of each state.

The MCA 1911

As we have stated earlier, the MCA 1911 was enacted to give effect to the Convention. For the purpose of this appeal, the relevant sections of the MCA 1911 are ss 1(1), 2, 8, 9 and 10 which provide as follows:

> 1(1) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault: ...
>
> [Proviso not relevant]
>
> 2 Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and of any other vessel or vessels, the liability of the owners of the vessels shall be joint and several: ...
>
> 8 No action shall be maintained to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered, and an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment:
>
> Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity.
>
> 9(1) This Act shall extend throughout His Majesty's Dominions.
>
> (3) The provisions of this Act shall be applied in all cases heard and determined in any court having jurisdiction to deal with the case and in whatever waters the damage or loss in question was caused...
>
> 10 This Act may be cited as the Maritime Conventions Act, 1911 and shall be construed as one with the Merchant Shipping Acts 1894 to 1907.

The Merchant Shipping Act 1894 ('the MSA 1894')

Section 742 of the MSA 1894 defines, inter alia, the expressions, 'ship' and 'vessel', as follows, unless the context otherwise requires:

> 'Ship' includes every description of vessel used in navigation and not propelled by oars;
>
> 'Vessel' includes any ship or boat, or any other description of vessel *used in navigation not propelled by oars*. (Emphasis added.)

In *Edwards* v *Quickenden & Forester*[3] where there was a collision between a single-oared skiff and a racing eight in the Thames River, Henn Collins J held that by virtue of the said definitions in the MSA 1894, the said crafts, being propelled by oars, were not vessels within the meaning of the MCA 1911. Therefore, all vessels propelled by anything other than by oars are vessels for the purpose of the MCA 1911, whether they are sea-going vessels or vessels of inland navigation. Sailing ships would be vessels for this purpose. There is nothing in the context of each ss 1, 2 and 9 and of the MCA 1911 which requires the meaning of vessel to be modified. It must follow that the motor boats belonging to the parties in the present case are vessels under the MCA 1911, notwithstanding that they were only licensed to ply within the port limits of Singapore.

Counsel for the plaintiffs however argues that notwithstanding the effect of the statutory definition, the MCA 1911 should only be applied to collisions between the categories of vessels as set out in art 1 of the Convention. This argument is based on the premise that the MCA 1911 does not conform to the Convention in this respect and therefore, it is necessary for the court to construe the statute to conform to the Convention. Counsel cited the following authorities: *Ellerman Lines Ltd* v *Murray*;[4] *Stag Line Ltd* v *Foscolo, Mango & Co Ltd*;[5] *Salomon* v *Commissioners of Customs & Excise*;[6] *Post Office* v *Estuary Radio Ltd*;[7] *The 'Annie Hay'*;[8] *Corocraft Ltd & Anor* v *Pan American Airways Inc*;[9] *James Buchanan & Co Ltd* v *Babco Forwarding & Shipping (UK) Ltd*;[10] *Fothergill* v *Monarch Airlines Ltd*;[11] *The 'Sandrina'*.[12] In *Salomon*'s case,[6] Diplock LJ (at p 143) formulated the rule as follows:

> ... there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another and others are not, the meaning which is consonant is to be preferred.

This submission cannot be accepted. There is no conflict whatever between the MCA 1911 and the Convention with respect to their respective scopes of application. The construction that the MCA 1911 applies to collisions between motor boats, whether or not they are sea-going vessels, does not render it in conflict with the Convention. It simply means that the scope of the MCA 1911 is wider than that of the Convention. The MCA 1911 was consonant with the international obligations of the United Kingdom Parliament. Accordingly, there is no room for the rule of construction relied upon by counsel for the plaintiffs. It does not apply. In any event, it is settled law that the duty of the court is to give effect to a national law and not international law if there were a real conflict between them. In the case of the MCA 1911, there is contextual evidence to suggest that the UK Parliament had intended the MCA 1911 to have a wider scope than the Convention by the deliberate omission to re-enact art 1 of the Convention as part of the MCA 1911 and by the express direction that the statute be construed as one with the Merchant Shipping Acts.

The questions that has to be considered next is whether the motor boats in the present case were used in navigation. In *Weeks* v *Ross*,[13] a motor boat was used for carrying more than 12 passengers from Exeter along the River Exe for half a mile and for a further mile along a canal to the first lock, returning thence to Exeter. Below that lock the canal continued for two miles, through other locks, to the estuary of the river, and it was used by seagoing ships for the purpose of going to and from Exeter. The court (or three judges) held that the motor boat was 'used in navigation' within the meaning of s 742 of the MSA 1894. Bray J in his judgment said:

> A river is a place for navigation and a canal is a place for navigation, and they are none the less places for navigation because as it happens this vessel only used a portion of them.

We have no doubt that the Singapore River was and is a place for navigation and that the two motor boats were being used for navigation on the Singapore River at the time of the collision. No distinction can be made between inland waters and the sea for this purpose.

We must therefore conclude that s 8 of the MCA 1911 applies in this action and that the plaintiffs' cause of action was barred upon the expiration of two years from the date of the collision.

Before we leave this issue, we should like to observe that the MSA 1894 was never applied directly to the Straits Settlements as part of their law, although parts of it were re-enacted by local legislation from time to time. The current Singapore statute on merchant shipping, the Merchant Shipping Act (Cap 179, 1985 Ed), was a consolidating and amending ordinance first enacted as Ordinance No 3 of 1910. As then enacted, it provided the same definition for the expressions 'ship' and 'vessel' as were provided in s 742 of the MSA 1894. Since then, Cap 179 has been amended on many occasions and the current definition of 'vessel' is as follows:

'vessel' includes any ship or boat or air cushioned vehicle or floating rig or platform used in any form of operations at sea or any other description of vessel.

The words 'not propelled by oars' have been omitted, and the result is that if the MCA 1911 were read as one with Cap 179, collisions between rowing boats on the Singapore river or its coastal waters would be within the MCA 1911. However, this is not the law as s 10 of the MCA 1911 does not require the statute to be read with Cap 179 but with the MSA 1894.

Extension of time

We now turn to the appeal against Chao Hick Tin JC's decision refusing the plaintiffs an extension of the limitation period. Chao Hick Tin JC held that the plaintiffs had not shown 'substantial grounds or good reasons justifying the late issue of the writ'. He agreed that although the proviso to s 8 gave 'the widest possible discretion to the court' (per Sir E Pollock MR in *The 'Arraiz'*[14]), he decided that it was a discretion which should 'only be used in favour of the plaintiff if there are special circumstances which create a real reason why the statutory limitation should not take effect' (per Hill J in *The 'Llandovery Castle'*[15] at p 125). Chao Hick Tin JC also considered the following decisions: (1) *The 'Kashmir'*[16] where the Court of Appeal refused to interfere with Hill J's refusal of extension of time, the delay being more than four years; (2) *The 'Alnwick'*,[17] where extension of time was granted to the plaintiff to add the second defendant as a party after the first defendant filed a belated defence seeking to throw the blame on the second defendant; (3) *The 'Owenbawn'*,[18] where the court renewed a writ on the finding that the correspondence between the parties evidenced an agreement between them that the writ should be deferred so long as negotiations were continuing; (4) *The 'Albany'*,[19] where the court did not consider the negotiations between the parties as a sufficient reason to extend time. In that case, the delay exceeded a year.

On the basis of these decisions, Chao Hick Tin JC appeared to have held that any negotiations, to qualify as a sufficient reason, must induce the party into withholding action. He found that in the present case, the negotiations between the parties had not lulled the plaintiffs into not issuing the writ in time. On the evidence before him, this finding must be correct as the delay was, as admitted by counsel for the plaintiffs, caused by either ignorance or oversight of the MCA 1911. For this reason, the only material pre-writ consideration before Chao Hick Tin JC was whether ignorance or an oversight of the MCA 1911 was a good reason for extending time. He held it was not.

Counsel for the plaintiffs has contended that Chao Hick Tin JC was wrong in so holding as he had applied the test of 'substantial grounds' or 'special reasons', which was more stringent than was required under the law. Counsel referred us to two recent English cases on s 8 of the MCA 1911 which were decided after Chao Hick Tin JC's decision. In *The 'Zirje'*,[20] Sheen J, after reviewing the previous decisions on the point, said, at p 497:

> ... in the light of the speech of Lord Brandon of Oakbrook [in *Waddon* v *Whitecroft Scovell Ltd* [1988] 1 WLR 309, concerning the exercise of discretion to renew the validity of a writ under O 6 r 8], and by parity of reasoning, a judge who is invited to extend the time limit set by s 8 of the Maritime Conventions Act 1911 should grant an extension if in all the circumstances of the case it appears to him that there is good reason for doing so. The exercise of his discretion to extend time should not be confined only to those cases where there appear to be exceptional or special circumstances.

In *The 'Seaspeed America'*,[21] Sheen J again said, at p 153:

> Parliament has not defined or sought to limit the circumstances in which or the extent to which the court may extend the time limit. Parliament has left those matters to the court and has given the court power to impose conditions. As Lord Brandon of Oakbrook said in *The 'Myrto' (No 3)* [1987] AC 597, at p 622, it is not possible to define or circumscribe the scope of the expression 'good reason'. Whether there is or is not good reason in any particular case must depend on all the circumstances of that case.

We accept the test formulated by Sheen J for the reasons given by him. Whether or not an extension of time ought to be granted depends on the circumstances of each case; they need not be exceptional or special. In the instant case, the circumstance was ignorance or oversight of either the MCA 1911 or its relevance to the claim. Although the said Act has been referred to in two local cases viz, *Ch'ng Kim Huat* v *Hamburg-Amerika-Nische Packetfahrt-Aktien Gesselschaft*[22] and *The 'Atlantic Faith'*,[23] and was also specifically referred to in Cap 54, a 1954 statute dealing with contributory negligence, a perusal of these materials would not disclose their relevance to a case of a collision between two motor boats on the Singapore River. It is also common knowledge that up to 1980 the legal profession was inadequately served in the way of local legal digests and textbooks. Therefore, it was not surprising that both firms of solicitors were not aware of this imperial statute which was also not included in the 1970 edition of the revised statutes of Singapore.

Chao Hick Tin JC did not accept ignorance or oversight of the MCA 1911 as a sufficient ground to grant an extension. He did not give any reason for so holding. We would say that as a general rule, ignorance or oversight of an applicable statute by a solicitor is no defence to a claim for negligence by his client when it leads to the claim being time-barred: *Fletcher & Son* v *Jubb, Booth & Helliwell*,[24] (where a solicitor was held negligent for overlooking the limitation period under

the Public Authorities Protection Act 1893). In that case, Scrutton LJ said (at p 281):

> It is a question of degree and there is a borderline within which it is difficult to say whether a breach of duty has been committed ... Now it is not the duty of every solicitor to know the contents of every statute of the realm. But there are some statutes which it is his duty to know; and in these days when the defendants in so many actions are public authorities the Public Authorities Protection Act 1893, is one of those statutes.

In addition to the factors which we have mentioned which made the MCA 1911 inaccessible to the average solicitor, it was not so often or regular that motor boats collided with one another on the Singapore River that would have brought the MCA 1911 to mind. We think that these factors are relevant in determining whether an extension of the limitation should have been given. However, in view of what we decide later on whether the plaintiffs have been prejudiced by the conduct of the defendant, it is not necessary for us to decide whether Chao Hick Tin JC's refusal was wrong.

Counsel for the plaintiffs has also contended that Chao Hick Tin JC exercised his discretion wrongly in refusing to take into account a crucial post-writ factor, ie the prejudice to the plaintiffs if leave to extend the limitation period is not granted. In an ordinary case where a plaintiff applies for extension of the limitation period before filing the writ or within a reasonable time thereafter in order to meet a plea of limitation, post-writ factors are not relevant to the court's exercise of discretion under s 8 of the MCA 1911. However, the instant case is exceptional in that the defendants, at the time of Chao Hick Tin JC's judgment, have been able to plead, by leave of the court, the defence of limitation more than seven years after the commencement of the action. In principle, the merits of the plaintiffs' application should be determined by the circumstances prevailing at the date of the application. If such circumstances show that the plaintiffs' right to recover damages from or in connection with the accidental death of TKH has been extinguished or diminished in some way, that, in our view, must be a material factor to be taken into account. Counsel for the defendants argues that as his clients are entitled to rely on the defence of limitation under the law, any prejudice that may flow from that plea should not be taken into account. In our view, this argument presupposes that a defendant may plead limitation at any time before the action is heard or disposed of. As we shall see, this is not the law.

At the date of the hearing of this appeal, Rajah J had reversed the assistant registrar's decision allowing the defendants' application to amend the defence. Hence the defendants' appeal in Appeal No 76 of 1989. Accordingly, the plaintiffs' case is now put on a contingent basis, that if the defendants are now allowed to plead limitation two consequences will follow: (a) the plea will defeat the action, and (b) the plaintiffs will also be left without any cause of action for damages for negligence against their own solicitors as such proceedings are also time-barred. This prejudice would not have resulted if the defendants had pleaded limitation to the plaintiffs' action before the second limitation period had expired. Counsel for the defendants contends the delay has not prejudiced the plaintiffs for two reasons. Firstly, he says that the plaintiffs' solicitors are not liable to the plaintiffs as they have not been 'grossly negligent', citing *Purves* v *Landell*[25] and *Godefroy* v *Dalton*[26] in support of the argument. Counsel appears to be suggesting that whilst the solicitors might have been negligent, they certainly were not grossly negligent. If this is the submission, then it is wrong as, in the law of civil negligence, there is no difference between 'gross negligence' and 'negligence'. As Rolfe B said in *Wilson* v *Brett*,[27] one is the same as the other 'with the addition of a vituperative epithet'. In our view, this argument is plainly inadmissible. First of all, it is a collateral issue. Secondly, the plaintiffs' solicitors are not before the court with respect to this issue. Thirdly, it is irrelevant to the point of the plaintiffs' case. The prejudice to the plaintiffs lies not in the loss of a good cause of action against the defendants but in the loss of a potentially good cause of action against their own solicitors. A successful plea of limitation by their solicitors will result in the dismissal of the plaintiffs' claim without the need for consideration of the merits of the claim. That, in our view, must constitute a material loss to the plaintiffs, who would thereby suffer injustice if leave to extend the limitation period is not granted to them.

In response to this, counsel for the defendants submits that there is no prejudice because the plaintiffs' action against their solicitors for negligence is not time-barred as they may claim in tort as well as in contract, citing *Esso Petroleum Co Ltd* v *Mardon*[28] at p 819 (per Lord Denning MR); *Midland Bank Trust Co Ltd & Anor* v *Hett, Stubbs & Kemp*[29] and *Ross* v *Caunters*,[30] and that whilst the claim in contract may be time-barred, the claim in tort is not as it does not arise unless damage is caused, and no damage can be caused until and unless the plaintiffs' action against the defendants is dismissed. In other words, time has not started to run. As this is also the basis of the defendants' case in CA No 76 of 1989, we propose to examine the argument in that appeal.

CA No 76 of 1989 — Application to amend defence

The general rules which guide a court in exercising its discretion to allow an amendment to a defence *before* the trial of the action are succinctly set out in the speech of Lord Brandon in *Ketteman & Ors* v *Hansel Properties Ltd & Ors*[31] at p 212 as follows:

> With regard to the principles on which his discretion to allow or refuse the applications to amend should be exercised, the judge referred to the notes to RSC O 20 r 5, in *The Supreme Court Practice 1982* and to the authorities there cited. The effect of these authorities can, I think, be summarized in the following four propositions. First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided. Secondly, amendments should be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs.

In *Ketteman*'s case,[31] the House of Lords, by a majority decision, upheld the order of the lower court not to allow an application by the defence to plead limitation at the closing stages of the trial on the ground that it was too late to do so. In the present case, the application was made about a week before trial and counsel for the defendants accordingly submits that *Ketteman*'s case[31] does not apply and the defendants should be allowed to amend as there is no injustice to the plaintiffs which cannot be compensated in costs. He contends that Rajah J was wrong in finding that irreparable harm would be caused to the plaintiffs and also in relying on *Steward* v *North Metropolitan Tramways Co*[32] as relevant to the present case. In that case, the plaintiff sued the defendants for damages for injuries suffered, occasioned by the failure of the defendants to maintain a road on which their tramway ran. Six months after the close of the pleadings, the defendants applied for leave to amend their defence by setting up a contract under s 29 of the Tramways Act 1870, whereby the liability to maintain the road was shifted to the vestry, the road authority of the district. At the time of the application, the limitation period within which the plaintiff could have sued the vestry had elapsed. The Court of Appeal held that the plaintiff had been misled into continuing the action against the defendants and would be prejudiced if the amendment were allowed. Accordingly, they upheld the decision of the lower court not to allow the amendment.

In our view, *Steward*'s case[32] is only an illustration of a case where injustice would be caused to the plaintiff if the defendants had been allowed to amend their defence. It was an application of the principles set out in the speech of Lord Brandon in *Ketteman*'s case.[31]

The next argument of counsel for the defendants is that limitation is a question of law and that the court must enforce it even if it is not pleaded. He says that a party is required to plead it in order to avoid surprising the other party. He relies on O 18 r 11 of the Rules of the Supreme Court and the authorities cited in para 18/11/1 of *The Supreme Court Practice 1988*. This argument has no merit whatsoever. Order 18 r 8 expressly requires the defence of limitation to be pleaded. If it is not pleaded, the defence has to be amended before the court will consider the plea, and this brings us back to the application for leave to amend.

The most substantial argument raised by counsel for the defendants is that the tort of negligence is not completed unless there is damage, that up to now, the plaintiff has suffered no damage and will suffer no damage *unless and until* the court grants the defendants leave the amend the defence. In *UBAF Ltd* v *European American Banking Corp*,[33] Ackner LJ said (at p 725):

> To establish a cause of action [for negligence] they must establish not only a breach of duty, but that that breach of duty occasioned them damage. This is axiomatic.

We should add, logically, counsel should have gone further to say that the damage arises not when leave is granted but when the action is dismissed upon the ground of the procedural bar at the hearing. Counsel refers to the decisions of the House of Lords in *Pirelli General Cable Works Ltd* v *Oscar Faber & Partners*[34] and *Ketteman*'s case[31] and a statement from *Charlesworth & Percy on Negligence* (8th Ed) para 3-136 which reads:

> Generally in negligence actions, the cause of action accrues at the time when the plaintiff actually suffers the damage, even though its consequences may not become apparent until later, and not at the date of the negligent act or omission. It is a question of fact in each case, whether actual damage has been established and, if so, when it had occurred. 'Normally the injury is contemporaneous with the wrongful act but it is not necessarily so.' However, because negligence does not become actionable without proof of damage, it is only after damage has been suffered that the cause of action becomes complete and time begins to run.

The question when damage arises for the purpose of an action in negligence has taxed the minds of English judges since the 1960s in connection with latent injuries and defects. Because the common law principles relating to the tort of negligence have been built up on a case by case basis over a long period of time, the problems associated with latent injuries and damage which can be quantified in monetary terms for the purpose of awarding compensation do not lend themselves to solution under a comprehensive or single principle of law. The solutions have been pragmatic. In *Cartledge & Ors* v *E Jopling & Sons Ltd*,[35] an industrial disease case, the House of Lords reaffirmed, albeit regretfully, the traditional doctrine that a cause of action accrued as soon as a wrongful act has caused personal injury beyond what could be regarded as negligible even when that injury was unknown to and could not be discovered by the

sufferer. In *Pirelli*'s case,[34] Lord Scarman agreed (at p 19) that it was unfair and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury or damage and that such a rule was harsh and absurd. So thought the Court of Appeal in *Sparham-Souter & Anor* v *Town & Country Developments (Essex) Ltd & Anor*,[36] a defective building case when it distinguished *Cartledge*'s case[35] and held that damage to the plaintiff occurred when he discovered or ought to have discovered the defect in the building and not when the defect occurred. In *Pirelli*'s case,[34] the House of Lords had to consider the problem again, this time in respect of a negligently designed factory. There were, in theory, four dates on which the House could have held that the damage had occurred for the purpose of the accrual of the cause of action in negligence: (1) the date when the design was completed; (2) the date when the factory was completed according to the design; (3) the date when the physical damage to the building occurred; and (4) the date when the damage was discovered. Notwithstanding the harshness and absurdity of the established principle, their Lordships applied *Cartledge*'s case[35] and overruled *Sparham-Souter*'s case.[36] They chose solution (3) and suggested that the legislature should change the law. The United Kingdom Parliament enacted the Latents Damage Act 1986 to overcome the problem.

The above line of decisions has not been followed in a series of cases where the loss was purely financial or economic. A claim against professional advisers for negligence is one for financial or economic loss. In *Forster* v *Outred & Co*,[37] the Court of Appeal held that actual damage was suffered by the plaintiff as soon as she executed the mortgage on the negligent advice of her solicitors whereby her property was encumbered and she was subject to a liability which might mature into a financial loss. Dunn LJ, in his judgment at p 99 said:

> ... I do not find the cases on physical and material damage very helpful. This is a case of economic loss ... I approach this case on the basis that it is sufficient that it is financial loss that should be foreseen, and I would hold that in cases of financial or economic loss the damage crystallizes and the cause of action is complete at the date when the plaintiff, in reliance on negligent advice, acts to his detriment.

Forster's case[34] was referred to in the leading speech of Lord Fraser in *Pirelli*'s[34] but was not disapproved. It was considered and distinguished by the Court of Appeal in *UBAF*'s case[33] (which was decided on its own facts). *Forster*'s case[37] was applied in *DW Moore & Co Ltd & Ors* v *Ferrier & Ors*[38] where the Court of Appeal, after reviewing all the relevant cases on economic loss caused by the negligence of solicitors, held that there was no presumption that on a solicitor's advice damage occurred when the advice was acted on; that it was a question of fact in each case whether actual damage had been established and when. In that case, the solicitors drafted a restrictive covenant for the plaintiffs when they decided to take in F as a shareholder and director in 1971. F's shareholding was increased in 1975 and a similar covenant was taken. F decided to set up his own business in 1980 when the plaintiffs discovered that the two covenants were not effective to bind F. The plaintiffs claimed damages for negligence against the solicitors in 1985. The solicitors pleaded that the action was time barred as the acts of negligence occurred in 1971 and 1975. The court agreed as the plaintiffs had received a worthless covenant rather than a valuable chose in action. The court did not accept an argument based on *Pirelli*'s case.[34] Bingham LJ, in his judgment applied the following test (at p 279):

> The matter may be tested. It is common ground, on the assumption that the plaintiffs' pleaded case is correct, that the defendants were in breach of contract when they negligently advised and settled documents in 1971 and 1975. A cause of action then arose. Suppose, *per impossible*, that the plaintiffs had sued at once and before the later difficulties with Mr Fenton arose. They would have been bound to succeed. If of opinion that the plaintiffs had suffered no damage, the judge would have awarded them nominal damages. But it seems to me plain that the judge would not have done that on these facts. He would have assessed as best he could on the available evidence the loss fairly and reasonably flowing in the usual course of things from the defendants' breach of contract, reaching a figure that might have been large or small but would not have been nominal. I think that the plaintiffs were in argument inclined to accept that. If, in a contractual claim for negligence, the court would have awarded other than nominal damages, I do not see how it can be said that an action in tort based on the same negligence would have been bound to fail for want of any damage as an essential ingredient of the cause of action.

Forster's case[37] and *Ferrier*'s case[38] concerned negligent advice given by solicitors and acted upon by clients. They have since been applied to negligent insurance brokers. In *JK Buckenham Ltd* v *Iron Trade Mutual Insurance Co Ltd*,[39] the defendant brokers had failed to procure effective reinsurance contracts for the plaintiffs, the contracts being voidable for non-disclosure of material facts. Counsel for the defendant argued that *Pirelli*[34] had brought together the principles applicable to building contract cases and economic loss cases. The deputy judge, after a thorough analysis of the previous case law, accepted the solicitors' cases as constituting 'a formidable body of modern authority' (at p 820) which was not affected by *Pirelli*'s case[34] and which he was unable to distinguish from the case before him. Accordingly, he held that the cause of action against the defendant accrued as soon as the contracts were executed, even though at that stage the reinsurers had not repudiated liability and were unaware of their right to do so.

This decision was followed by Evans J in *Islander Trucking Ltd* v *Hogg Robinson & Gardner Mountain (Marine) Ltd*.[40] He applied the test of commercial value

to determine whether the plaintiff had suffered damage. Accordingly, he held that where a person failed to obtain a valid and effective policy of insurance as a result of a misrepresentation or non-disclosure by an insurance broker, that person suffered damage at the time when the insurance contract was executed and not when the insurers later discovered the material facts and elected to avoid the contract, since at the time of execution of the contract he had entered into a contract which was of less commercial value than that which he had engaged the broker to procure.

This court is not bound by any of the English decisions as to what the common law is in Singapore in relation to actions before us. We are free to depart from the principles laid down in the English cases if the circumstances of Singapore require. However, we do not think the local circumstances justify our departure from the principle applied in the insurance brokers' cases. In relation to the material facts, they are virtually identical to those in the present action. The negligence of the brokers lay not in giving advice but in effecting worthless insurance policies. In the present case, the negligence, if any, of the plaintiffs' solicitors lies not in giving advice or drafting a document but in commencing a worthless action. It may be argued that the action has value so long as limitation is not pleaded and only becomes worthless if and when it is pleaded, so that no damage is caused to the plaintiffs until it is pleaded. Such an agreement has been by implication rejected by the English courts. We do not think that this is the correct way to determine whether the plaintiffs have suffered damage. It was entirely foreseeable that the defendants would plead limitation. In our view, the action was worthless when commenced as it was time-barred and would only acquire some value should the defendants fail to plead limitation at all. It was entirely foreseeable that the defendants would plead limitation and therefore it was unforeseeable that the action would require any value. This case is extraordinary only because what was foreseeable did not happen for more than seven years. In principle, the instant case cannot be distinguished from the insurance brokers' cases. The plaintiffs have suffered damage when their solicitors commenced a defeasible action, just as the plaintiffs in the insurance brokers cases suffered damage when the brokers obtained voidable policies.

For the above reasons, we find that the plaintiffs will be prejudiced if the defendants are granted leave to amend their defence at this stage of the proceedings as whatever claim they may have against their solicitors for negligence has been time-barred. The loss of the opportunity to pursue a viable claim is sufficient prejudice to debar the defendants from obtaining leave to amend their defence. In our view, the decision of Rajah J was correct and the appeal against it must be dismissed.

In view of our finding that the plaintiffs will suffer prejudice if leave is granted to the defendants to amend their defence, the decision of Chao Hick Tin JC in not extending the limitation period is wrong. Although the prejudice to the plaintiffs is a post-writ factor, it has to be taken into account in an application for extension of the limitation period under the MCA 1911. In our view, Chao Hick Tin JC adopted too narrow a view of the ambit of s 8 thereof in limiting the relevant factors only to those occurring before the issue of the writ. The relevant factors must be those obtaining at the time the application is made or heard.

Appeals from interlocutory orders — Section 34 of the Supreme Court of Judicature Act (Cap 322, 1985 Ed)

At the commencement of the hearing before us, counsel for the plaintiffs made a preliminary objection to the defendants' appeal in CA No 76 of 1989 on the ground that Rajah J had no jurisdiction or power to grant the defendants' application for extension of time to appeal on the ground that the application, having been made more than one month after Rajah J's order reversing the assistant registrar's order, could only be made to the Court of Appeal under O 57 r 17 of the Rules of the Supreme Court 1970. We held that this objection could not be raised in this appeal as Rajah J's order had not been appealed against. However, as counsel has requested us to give our views on the point, we agree to do so as it is a point of general importance to the legal profession.

Section 34(2) of Cap 322 provides as follows:

> No appeal shall lie from an interlocutory order made by a Judge in chambers unless the Judge has certified, after application, within 4 days after the making of the order by an party for further argument in court, that he requires no further argument, or unless leave is obtained from the Court of Appeal or from the Judge who heard the application.

The section is clear. A party has no right of appeal against an interlocutory order of a judge-in-chambers except where: (1) within four days after the making of the order, he has *applied* for further argument *in court*, and the judge *has certified* that he requires no further argument; or (2) he has obtained leave from the Court of Appeal or from the judge who heard the application.

Where the judge has certified that he agrees to hear further argument, he hears it in court and not in chambers. The use of the expression 'in court' in contrast with the use of the expression 'judge-in-chambers' makes this clear. However, the judge may, with the consent of the parties, treat his chambers as open court for this purpose. It is for each judge to decide, subject to the consent of the parties. In the present case, Rajah J adopted this procedure.

Where a party requires the right of appeal, time begins to run under O 57 r 4 for filing the notice of appeal, ie either when he is informed of the judge's certification that he does not wish to hear further argument: see *Bank of America NT & SA* v *Chai Yen*[4] (a Malaysian decision on a similar provision), or, where there is rehearing, from the date of the order made on the rehearing. If the party fails to file his notice of appeal in compliance with O 57 r 4, he may apply to the Court of Appeal, but not to the court below, for extension of time under O 57 r 17.

Under s 34(2), the aggrieved party need not request further argument. He has the option of applying for leave from the judge or the Court of Appeal. By virtue of s 35 of Cap 322, he must first apply to the judge who heard the application. A further application may be made to the Court of Appeal under O 57 r 16(3). What is not provided is the period within which he must apply for leave.

Our disposition of these two appeals is as follows: (1) the appeal in CA No 76 of 1989 is dismissed with costs, and, in consequence (2) we make no order in CA No 18 of 1989, with no order as to costs, each having succeeded on one of the two main issues in this appeal.

Order accordingly.

Solicitors: *Godwin & Co; Murphy & Dunbar.*

Reported by *Zarinah Marican*

Ng Swee Hong v Singmarine Shipyard Pte Ltd

COURT OF APPEAL (SINGAPORE) — CIVIL APPEAL NO 30 OF 1985
YONG PUNG HOW CJ, LAI KEW CHAI AND THEAN JJ
1 JUNE 1991

Civil Procedure — Writ, service of — Substituted service — Defendant out of jurisdiction — Effect of substituted service

The respondents (plaintiffs) began an action against the appellant as guarantor for the payment of repair bills. The appellant had left Singapore before the writ and statement of claim were filed. Attempts were then made to serve the writ on the appellant which were unsuccessful. The respondents' solicitors were later informed that the appellant had left Singapore. On application by the respondents, an order for substituted service was made whereby service was to be effected, inter alia, by posting a copy of the writ together with a copy of the order at No 66 Chun Tin Road, which was the appellant's home address in Singapore. The appellant then entered conditional appearance through his solicitors. An application was made for the service of the writ to be set aside which was dismissed. The appellant appealed.

Held, dismissing the appeal:

(1) Under O 62 r 5, where it is impractical for any reason to serve a document personally on a person, the court may order substituted service of that document. Substituted service is then effected by taking such steps as the court may direct to bring the document to the notice of the person to be served.

(2) In considering the question of whether the order for substituted service in this case was adequate to bring the writ and statement of claim to the notice of the appellant, there is the affidavit of the respondents' solicitors which show that the appellant had solicitors acting for him, and that they were in a position to state that the time of the appellant's return was not known. It is also clear from the affidavit and evidence of the appellant's son that the appellant was in contact with his family and that the writ and statement of claim served at No 66 Chun Tin Road were brought to the appellant's notice. The requirement of O 62 r 5 has thus been satisfied.

Cases referred to

1 *Fry* v *Moore* (1889) 23 QBD 395 (refd)
2 *Field* v *Bennett* (1886) 56 LJQB 89 (refd)
3 *Myerson* v *Martin* [1979] 3 All ER 667 (refd)

Legislation referred to

Rules of the Supreme Court 1970 O 62 r 5

Tang Liang Hong for the appellant.
Thomas Tan Boon Yong for the respondents.

Cur Adv Vult

Yong Pung How CJ (delivering the judgment of the court): The issue in this appeal is the effect of substituted service when the defendant was out of the jurisdiction at the time the writ was issued. The facts material to this appeal are as follows.

The respondents who were the plaintiffs are shipbuilders and shiprepairers. Repairs were executed by